No. 80-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

I. MEYER PINCUS, *Appellant,*

v.

ESTATE OF LEO GREENBERG, THE HONORABLE PAUL M. MARKO, III and THE HONORABLE LEROY H. MOE, *Appellees.*

On Appeal From The Supreme Court Of Florida

BRIEF FOR *AMICUS CURIAE* THE STATE OF FLORIDA

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE APPEAL PRESENTS NO JUSTICIABLE CASE OR CONTROVERSY	4
II. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION	5
A. The Administration Of Estates Is Committed By The Constitution To The Several States	5
B. No Fundamental Rights Are Infringed By The Florida Statutes	7
1. There is no fundamental right to appoint a personal representative	7
2. The right to travel is not unconstitutionally restricted by the Florida statutes	9
3. The appellant's fundamental right to pursue a livelihood is not infringed by the Florida statutes	11
C. Since No Fundamental Right Is Infringed, The Florida Statutes Need Only Reasonably Serve An Important State Interest	11
1. The Florida statutes do not deny the decedent or the appellant equal protection	11
2. The Florida statutes do not deny the decedent or the appellant due process of law	13
D. The Florida Statutes Do Not Deny The Appellant The Privileges And Immunities Of The Citizens Of Florida	14

Table of Contents Continued

PAGE

E. The Appellant's Claim Under The Commerce Clause Is Not Properly Before This Court And Is Wholly Without Merit 15

F. The Appellant's Claim Under The Full Faith And Credit Clause Is Not Properly Before This Court And Is Wholly Without Merit ... 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES:	PAGE
Auto Workers v. *Scofield*, 382 U.S. 205 (1965)	4, 16
Baker v. *Carr*, 369 U.S. 186 (1962)	9
Baldwin v. *Montana Fish & Game Commission*, 436 U.S. 371 (1978)	14
Beverly Beach Properties v. *Nelson*, 68 So.2d 604 (Fla. 1953), *cert. denied*, 348 U.S. 816 (1954)	2
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	8
Brown v. *Supreme Court of Virginia*, 414 U.S. 1034, *aff'g* 359 F. Supp. 549 (E.D. Va. 1973)	6, 9, 10, 11, 12
Califano v. *Torres*, 435 U.S. 1 (1978)	10
Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	15
DeBacker v. *Brainard*, 396 U.S. 28 (1969)	15
Fain v. *Hall*, 463 F. Supp. 661 (M.D. Fla. 1979)	3
Flast v. *Cohen*, 392 U.S. 83 (1968)	9
Florida Steel Corporation v. *Dickinson*, 328 So.2d 418 (Fla. 1976)	2
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	5, 11, 15
GTE Sylvania, Inc. v. *Consumers Union*, 444 U.S. 818 (1980)	5
Head v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963)	15
Hicklin v. *Orbeck*, 437 U.S. 518 (1978)	14
Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960)	15
In re Emery, 59 Ohio App. 2d 7, 391 N.E.2d 746 (1978)	11
In re Griffiths, 413 U.S. 717 (1973)	11
In re Mulford, 217 Ill. 242, 75 N.E. 345 (1905)	14
Irving Trust Co. v. *Day*, 314 U.S. 556 (1942)	5
Kovrak v. *Ginsburg*, 358 U.S. 52 (1958)	6

Table of Authorities Continued

CASES:	PAGE
Labine v. *Vincent*, 401 U.S. 532 (1971)	5
Lalli v. *Lalli*, 439 U.S. 259 (1978)	5, 11
Leis v. *Flynt*, 439 U.S. 438 (1979)	5, 8, 9, 11, 14
Lindsey v. *Normet*, 405 U.S. 56 (1972)	8
Lindsley v. *National Carbonic Gas Co.*, 220 U.S. 61 (1911)	13
Loving v. *Virginia*, 388 U.S. 1 (1967)	8
Martin v. *Walton*, 368 U.S. 25 (1961)	6
McCarthy v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976)	10
McDonald v. *Board of Election*, 394 U.S. 802 (1969)	13
Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974)	10
Mishkin v. *New York*, 383 U.S. 502 (1966)	15
Moore v. *Supreme Court of South Carolina*, 447 F. Supp. 527 (D.S.C. 1977), *aff'd*, 577 F.2d 735 (4th Cir.), *cert. denied*, 439 U.S. 984 (1978)	14
Norfolk and Western Railway Co. v. *Beatty*, 423 U.S. 1009, *aff'g* 400 F. Supp. 234 (S.D. Ill. 1975)	5, 9
Parham v. *Hughes*, 441 U.S. 347 (1979)	13
Roe v. *Wade*, 410 U.S. 113 (1973)	8
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973)	8, 9
Sanks v. *Georgia*, 401 U.S. 144 (1971)	5
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	10
Sosna v. *Iowa*, 419 U.S. 393 (1975)	14
Texas v. *New Jersey*, 379 U.S. 674 (1965)	2
Union National Bank v. *Lamb*, 337 U.S. 38 (1949)	15
United States v. *Fruehauf*, 365 U.S. 146 (1961)	5
United States v. *Moser*, 266 U.S. 236 (1924)	16

Table of Authorities Continued

CASES: PAGE

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) ... 13

Western Union Telegraph Co. v. *Foster*, 247 U.S. 105 (1917) 4, 16

Weinberger v. *Salfi*, 422 U.S. 749 (1975) 13

Wilson v. *Wilson*, 416 F. Supp. 984 (D. Ore. 1976), *aff'd*, 430 U.S. 925 (1977) 12

STATUTES:

Fla. Stat. §733.402 (1978) 12

Fla. Stat. §733.604 (1978) 7

Fla. Stat. §733.605 (1978) 7

Fla. Stat. §733.607 (1978) 7

Fla. Stat. §733.612 (1978) 7

Fla. Stat. §733.613 (1978) 7

MISCELLANEOUS:

Restatement (Second) of Judgments §88.7 (Tentative Draft No. 3, 1976) 16

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ESTATE OF LEO GREENBERG, THE HONORABLE PAUL M. MARKO, III and THE HONORABLE LEROY H. MOE, *Appellees.*

On Appeal From The Supreme Court Of Florida

BRIEF FOR *AMICUS CURIAE* THE STATE OF FLORIDA

INTEREST OF *AMICUS CURIAE*

The Attorney General of the State of Florida, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief on behalf of the State of Florida as *amicus curiae* urging that this appeal be dismissed on the grounds that it fails to present a substantial federal question or a justiciable case or controversy. Alternatively, the State of Florida submits that the judgment of the Supreme Court of Florida should be summarily affirmed.

The appellant seeks in this action to declare unconstitutional statutes of the State of Florida precluding a nonresident who is not a relative of the decedent from serving as personal representative of a Florida estate. However, because the appellant did not name as a party below the State or any other person interested in defending the statutes, the State has a vital interest in appearing as *amicus curiae* in support of its legislation.[1]

STATEMENT OF THE CASE

Leo Greenberg moved to Florida in 1972 and died a resident of that state in 1978.[2] His will designated the appellant, who drafted the will, as an alternate choice for co-personal representative. The appellant, I. Meyer Pincus, is a resident of New York who is not a relative of the decedent. He petitioned the Florida probate court for appointment as co-personal representative of the estate upon the withdrawal of an original nominee, but the petition was denied in accordance with Florida's statutory requirement that a personal representative be either a relative of the deceased or a Florida resident.

Mr. Pincus, while serving as an attorney for the estate, appealed the order denying his appointment,

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[1] The State of Florida wishes to preserve its right to intervene pursuant to Rule 28.4(c) if the judgment below is not summarily affirmed or the appeal dismissed.

[2] His estate consisted of Florida real estate, deposits in Florida banks, and intangible personal property, the situs of which is in Florida. *See Florida Steel Corporation* v. *Dickinson*, 328 So.2d 418 (Fla. 1976); *Beverly Beach Properties* v. *Nelson*, 68 So.2d 604 (Fla. 1953), *cert. denied*, 348 U.S. 816 (1954); *cf. Texas* v. *New Jersey*, 379 U.S. 674 (1965) (intangibles escheat to state of owner's domicile).

naming only the estate as an adverse party. The qualified personal representative of the estate and the primary beneficiaries consented to and supported the appellant's appointment as personal representative. Neither the appellee estate nor any other party has presented any arguments in opposition to the appellant's claims.

The Attorney General filed on behalf of the State of Florida a motion to intervene as a party at the appellate level, but was allowed to participate only as *amicus curiae*. The judges who denied the appellant's appointment were named as "parties" only upon filing of the Notice of Appeal to this Court.

In the probate court proceedings, Mr. Pincus asserted that the Florida statutes violated the privileges and immunities clause and the fourteenth amendment of the United States Constitution. During the appeal proceedings, the decision in *Fain* v. *Hall*, 463 F. Supp. 661 (M.D. Fla. 1979), was rendered, holding that due process requires that a nonresident nominee be afforded a hearing to demonstrate his ability to perform as personal representative. After that decision was rendered, appellant contended that the *Fain* decision worked an "estoppel by judgment" binding the Florida courts. The appellant did not assert in the state court proceedings that the Florida statutes violated the commerce clause or expressly claim that the probate court's denial of his appointment violated the full faith and credit clause. The Supreme Court of Florida rejected the appellant's constitutional claims and upheld the Florida statutes.

SUMMARY OF ARGUMENT

There is no case or controversy presented by the appeal because there is no adverse party to the suit.

Furthermore, the appeal presents no substantial federal question. The Constitution commits to the states the regulation of the administration of estates and the devolution of property within their jurisdictions. There is no federally protected fundamental right to appoint a personal representative, and, in the context of this case, there is no infringement of the fundamental rights to travel and to earn a livelihood. The statutory preclusion of unrelated nonresidents from serving in the important fiduciary capacity of personal representative is comparable to residency requirements for the practice of law and is rationally related to an important state goal, the effective and efficient administration of estates. Thus, the statutes do not deny any citizen equal protection, due process or the privileges and immunities of Florida residents. Appellant's commerce clause claim was not timely raised and is without merit. His full faith and credit claim was not expressly asserted below, is not a proper issue for appeal, and is without merit.

ARGUMENT

I. THE APPEAL PRESENTS NO JUSTICIABLE CASE OR CONTROVERSY.

There have never been any adverse proceedings between I. Meyer Pincus and the only nominal adverse party below, the Estate of Leo Greenberg, and the presence of an *amicus* is insufficient to create a justiciable controversy. *See Auto Workers* v. *Scofield*, 382 U.S. 205 (1965); *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1917). Since the Court is being asked to render an advisory opinion on important state legislation in a case in which the record has not been fully developed through the presence of an adverse party undertaking to uphold the Florida statutes, it should

decline to hear this appeal. *See Sanks* v. *Georgia*, 401 U.S. 144 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *see generally GTE Sylvania, Inc.* v. *Consumers Union*, 444 U.S. 818 (1980).

II. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Administration Of Estates Is Committed By The Constitution To The Several States.

The Constitution commits to the states the power to control and regulate the disposition of property within their jurisdictions and the administration of the estates of their citizens. *See Lalli* v. *Lalli*, 439 U.S. 259 (1978); *Labine* v. *Vincent*, 401 U.S. 532 (1971). Thus, supervision of testamentary dispositions is a legitimate and important state interest. Nothing in the Constitution forbids a state from limiting or even abolishing the power to make a testamentary bequest of property within its jurisdiction. *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942).

Supervision of the administration of estates is a governmental function which, like the administration of justice, is entrusted to the courts. In both instances, the state has a significant and even compelling interest in ensuring that individuals acting in a representative capacity can fulfill their fiduciary obligations. A state's authority to regulate the practice of law is well recognized, *see, e.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), and simple residency requirements for admission to state bars have been consistently found not to infringe any fundamental rights. *Leis* v. *Flynt*, 439 U.S. 438 (1979); *Norfolk and Western Railway Co.* v. *Beatty*, 423 U.S. 1009, *aff'g* 400 F. Supp. 234 (S.D. Ill.

1975); *Brown* v. *Supreme Court of Virginia*, 414 U.S. 1034, *aff'g* 359 F. Supp. 549 (E.D. Va. 1973). Appeals which present constitutional attacks on residency requirements for state bar admission are uniformly dismissed for failure to present a substantial federal question, *Martin* v. *Walton*, 368 U.S. 25 (1961); *Kovrak* v. *Ginsburg*, 358 U.S. 52 (1958), and this appeal should be treated in like fashion.

The state's interest in the appointment of a personal representative is in many respects even more compelling than the general regulation of the practice of law. The state's role in limiting the individuals who may serve as personal representatives is equivalent to that in appointing a qualified guardian to represent a minor or an incompetent, or in selecting a receiver in insolvency proceedings. In each case, the state must assure that the individual will protect the interests of one who is not present or able to guide the representative or the court or to personally evaluate the representative's performance. The discretion to make or approve the appointment of a personal representative has traditionally been delegated to the courts, and the states have legislatively restricted the class of persons from which the selection can be made to exclude those not best situated to serve.

By enacting the statutes in issue, the Florida legislature concluded that unrelated nonresidents are not in the best position to perform the duties of personal representatives. The administration of a decedent's estate is an intensely localized matter, requiring that the personal representative be well informed on local issues such as the scope of local property values, the identity of convenient and reputable appraisers, and local business practices. He must also be readily available to the court, beneficiaries and creditors in order to answer

questions and take all necessary and timely actions.[3] Because this regulation of the process contributes to the effective, efficient and expeditious administration of the estate, it is, at a minimum, substantially related to this legitimate and compelling state goal.

B. No Fundamental Rights Are Infringed By The Florida Statutes.

(1) There is no fundamental right to appoint a personal representative.

This Court has steadfastly resisted efforts to expand fundamental rights and has confined that concept to

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[3] The availability of the personal representative, defined more broadly than mere amenability to service of process, is important to the effective administration of estates. Under Florida's statutory scheme, the personal representative must take possession of the estate assets, *Fla. Stat.* §733.607 (1978), must perform, compromise or refuse performance of the decedent's contracts, *id.* §733.612(2), and must secure appraisals of assets. *Id.* §733.605. In the area of creditors' claims, the representative has an obligation to creditors and beneficiaries, *id.* §733.612(20) and (24), and must evaluate claims against the estate and, to preserve decedent's rights, object to them within four months of the first publication of notice of administration and, where necessary, sue to recover assets. He must consult with beneficiaries on a continuing basis regarding their needs and the timing, nature and tax aspects of distributions. He must file tax returns and reports and inventories required by the local probate court. *Id.* §733.604(1). The statutes empower the personal representative, without a court order, to continue any unincorporated business of the decedent for a period, *id.* §733.612(22), and to sell the decedent's property under a testamentary power to do so. *Id.* §733.613. The Florida courts must supervise these actions, and the Florida legislature can, on the basis of practical experience, resonably conclude that administration by Florida residents should be more effective since residents are more likely than nonresidents to be responsive to the Florida judiciary.

those rights which are explicitly or implicitly guaranteed by our federal Constitution. Thus, such important interests as education and housing are not deemed to be fundamental rights. *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) (education); *Lindsey* v. *Normet*, 405 U.S. 56 (1972) (housing). The Constitution does not expressly provide a right to appoint a personal representative to oversee one's testamentary disposition, and the constitutional language cannot be construed to imply such a fundamental right. There is not even a fundamental right to make a testamentary disposition of one's property or to receive a testamentary devise. These are statutory privileges created by the states pursuant to the power constitutionally reserved to them. Consequently, there can be no fundamental right to appoint a personal representative to oversee that testamentary disposition and the administration of one's estate.[4]

The appointment of a personal representative cannot be equated with the intimate family decisions regarding procreation, divorce and marriage addressed respectively by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), and *Loving* v. *Virginia*, 388 U.S. 1 (1967). The Constitution does not create a broad category of fundamental rights under the banner of "family decisions." Decisions regarding procreation, divorce or marriage have been deemed by the Court to be fundamental only because they are encompassed by the constitutional right of privacy. The right of privacy cannot logically be expanded to include the choice of a personal representative.

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[4] This Court has recognized that there is no right of federal origin allowing one to choose an attorney who does not meet state residency qualifications. *E.g., Leis* v. *Flynt*, 439 U.S. 438 (1979).

The selection of a family doctor or lawyer is a more vital family decision than the selection of a personal representative. Yet it is well settled that even these decisions do not involve fundamental rights, *Leis* v. *Flynt,* 439 U.S. at 443, *Brown* v. *Supreme Court of Virginia,* 359 F. Supp. at 559 and 562 n.15, and cannot be given that status simply because they may be remotely related to some constitutionally protected right. *Cf. San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). As stated in *Norfolk and Western Railway Co.* v. *Beatty*, 400 F. Supp. 234, 237 (S.D. Ill.), *aff'd*, 423 U.S. 1009 (1975), "No constitutional basis is found to grant a civil litigant, patient or other client the right to compel the admission of a nonresident to the practice of law, medicine, or other profession within a state." Likewise, there can be no constitutional basis for a right to appoint a personal representative simply because that action may affect family members.

Even if there were some fundamental right to appoint a personal representative, it would be the testator's right. A denial of any such right of the testator could result in injury only to the protected interests of the estate or its beneficiaries, who are not appellants in this suit. Mr. Pincus personally has suffered no such injury, and therefore has no standing to assert infringement of any right of the decedent. *See Flast* v. *Cohen,* 392 U.S. 83, 98-101 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

(2) The right to travel is not unconstitutionally restricted by the Florida statutes.

Although the right to travel throughout the states is a fundamental right protected by the Constitution, state

statutes are subject to strict scrutiny only if they somehow penalize the exercise of that right. *See Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 256-57 (1974); *Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969). Mr. Pincus complains that Leo Greenberg's right to travel was unconstitutionally penalized because his chosen personal representative was no longer qualified to serve when Mr. Greenberg moved to Florida. However, the right to travel requires only that a person who moves from one state to another be given benefits *equal* to those enjoyed by residents of the state to which he travels, not superior rights that he enjoyed in the state from which he came. *Califano* v. *Torres,* 435 U.S. 1 (1978). All citizens of Florida are prohibited by the Florida statutes from having unrelated nonresidents serve as personal representatives. Thus, the statutes may make Florida a less attractive destination to the testator, but they do not unconstitutionally restrict his fundamental right to travel. This Court has consistently recognized that simple residency requirements do not unconstitutionally impact on the right to travel. *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645 (1976); *Maricopa County,* 415 U.S. at 255; *accord, Brown* v. *Supreme Court of Virginia,* 359 F. Supp. at 561.

In any event, the appellant has no standing to assert an unconstitutional restriction of the testator's right to travel. An infringement of that right would not result in any direct injury to any constitutionally protected interest of the appellant.

(3) The appellant's fundamental right to pursue a livelihood is not infringed by the Florida statutes.

Appellant's fundamental right to pursue a livelihood gives him no more constitutional right to serve as a personal representative in Florida than he has to practice law in Florida. Residency requirements for bar admission do not violate a nonresident's fundamental right to earn a livelihood. *See Leis* v. *Flynt,* 439 U.S. 438 (1979); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975); *In re Griffiths,* 413 U.S. 717, 722-23 (1973); *Brown* v. *Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va. 1973). A residency requirement for personal representatives likewise cannot violate that right.

C. Since No Fundamental Right Is Infringed, The Florida Statutes Need Only Reasonably Serve An Important State Interest.

(1) The Florida statutes do not deny the decedent or the appellant equal protection.

Regardless of the level of scrutiny applied, the Florida statutes do not violate the equal protection clause because the residency requirement is substantially related to the State's compelling and important interest in the efficient and effective administration of estates. *See Lalli* v. *Lalli,* 439 U.S. 259 (1978) (equal protection allows state to restrict illegitimate's right of inheritance); *In re Emery,* 59 Ohio App.2d 7, 391 N.E.2d 746 (1978) (statutory preclusion of nonresident executors held not to deny equal protection). *Cf. Brown* v. *Supreme Court*

of Virginia, 414 U.S. 1034, *aff'g* 359 F. Supp. 549 (E.D. Va. 1973) (residency requirement for bar admission held not a denial of equal protection); *accord, Wilson* v. *Wilson,* 416 F. Supp. 984 (D. Ore. 1976), *aff'd,* 430 U.S. 925 (1977).

The Florida legislature could rationally decide that requiring a personal representative to be a Florida resident or a relative of the decedent would better ensure that creditors, beneficiaries and assets will be protected and that the estate will be administered without needless delays or costs.[5] The exception for nonresident relatives does not indicate, as appellant contends, that the residency requirement is illogical. A relative named by a testator is in most circumstances a trusted family member who is also a primary beneficiary of the estate or has a personal interest in the welfare of other beneficiaries. He is more likely to be in close contact with beneficiaries and creditors and to make himself available in the state of the decedent's residence to protect his personal interest in the administration of the estate. Therefore, his interest in the expeditious, efficient and effective administration of the estate counterbalances any disadvantage of having a nonresident personal representative.

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[5] Contrary to the appellant's assertions, a bonding requirement inadequately protects the estate from potential loss. Florida law specifically provides for waiver of the posting of bond by a personal representative. *See Fla. Stat.* §733.402 (1978). Such a waiver is frequently inserted in wills, and was indeed inserted in the Greenberg will. In addition, the fact that a nonresident personal representative is amenable to service of process in Florida courts in some instances affords inadequate protection. No provision of the Florida statutes establishes service in an action for mismanagement of the estate by a nonresident personal representative. His failure to perform his duties properly could, therefore, result in detriment to the estate and loss to the beneficiaries and creditors.

The fact that a particular unrelated nonresident may be able to perform as well as a nonresident relative does not make the statutory classification illogical. As the Court stated in *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), "A classification having some reasonable basis does not offend against [the equal protection] clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality." *See Parham* v. *Hughes*, 441 U.S. 347, 357-58 (1979).

(2) The Florida statutes do not deny the decedent or the appellant due process of law.

The Florida statutes do not establish an irrebuttable presumption that nonresidents are not competent to serve as personal representatives, but merely reflect a legislative determination of the most effective method for the administration of estates. Under the Florida statutes, the competence of the appellant is irrelevant. Even if the statutes are analyzed as containing a presumption, however, due process does not require that the appellant be given a hearing to demonstrate his qualifications because the Florida statutes do not impinge upon fundamental rights or involve a suspect classification. It is only essential that there be some rational connection between the fact of nonresidency and the presumption that estates are better administered by residents or family members, and that this connection not be so unreasonable as to be arbitrary. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *McDonald* v. *Board of Election*, 394 U.S. 802 (1969). As already noted, the Florida legislature can rationally conclude that unrelated nonresidents are not best suited to serve

as personal representatives. Thus, the statutes are neither arbitrary nor unreasonable. *See Leis* v. *Flynt,* 439 U.S. at 443-45; *Sosna* v. *Iowa,* 419 U.S. 393, 409-10 (1975); *Moore* v. *Supreme Court of South Carolina,* 447 F. Supp. 527 (D.S.C. 1977), *aff'd,* 577 F.2d 735 (4th Cir.), *cert. denied,* 439 U.S. 984 (1978).

D. The Florida Statutes Do Not Deny The Appellant The Privileges And Immunities Of The Citizens Of Florida.

Mr. Pincus apparently claims that he was denied the privilege of serving as a personal representative in Florida, and that reservation of that activity for residents or relatives of decedents violates the privileges and immunities clause. Yet the privileges and immunities clause protects against only those distinctions between residents and nonresidents which hinder the formation, purpose or development of a single union of states and requires that nonresidents be treated equally with residents only where the nonresident is seeking to "engage in an essential activity or exercise a basic right." *Baldwin* v. *Montana Fish and Game Commission,* 436 U.S. 371, 387 (1978); *see Hicklin* v. *Orbeck,* 437 U.S. 518 (1978).

Serving as a personal representative does not rise to the level of an essential activity or basic right, nor can it be said to be a privilege or immunity bearing upon the vitality of this nation as a single entity. Accordingly, appellant's appointment is not protected by the privileges and immunities clause of the Constitution. *See In re Mulford,* 217 Ill. 242, 75 N.E. 345 (1905) (statutory preclusion of nonresident executors held not to violate the privileges and immunities clause).

E. The Appellant's Claim Under The Commerce Clause Is Not Properly Before This Court And Is Wholly Without Merit.

The appellant did not raise his commerce clause claim in the Florida courts and has therefore failed to preserve this issue for review by this Court. *See Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

Even if the commerce clause claim were properly raised below, it has no merit. Denying the appellant the right to serve as the personal representative of an estate does not "materially restrict the free flow of commerce" and has at most only a de minimus and incidental effect upon interstate commerce. *See Goldfarb* v. *Virginia State Bar,* 421 U.S. at 792; *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

F. The Appellant's Claim Under The Full Faith And Credit Clause Is Not Properly Before This Court And Is Wholly Without Merit.

The appellant did not expressly assert a full faith and credit claim in the Florida courts and has therefore also failed to preserve this issue for review.

Moreover, the appellant's full faith and credit claim does not address the constitutional validity of the Florida statutes but is an attack upon the action of the Supreme Court of Florida in not following the *Fain* decision. This issue is not a proper subject for appeal, and should be disregarded in determining the propriety of reviewing this case. *See DeBacker* v. *Brainard,* 396 U.S. 28 (1969); *Mishkin* v. *New York,* 383 U.S. 502, 512 (1966); *Union National Bank* v. *Lamb,* 337 U.S. 38 (1949).

Furthermore, the judgment in *Fain* does not bind the appellee estate, which was neither a party nor in privity with parties to that suit.[6] Appellant's contention, which is in effect an assertion that the judgment of the first court to decide an issue of law may be used by a stranger to the first action to estop a defendent also a stranger to the first action, is patently erroneous. A federal district court's declaratory judgment on unmixed questions of law regarding the constitutionality of a state statute of public importance does not estop that state's highest court from reaching an independent decision. *See United States* v. *Moser,* 266 U.S. 236, 242 (1924); *Restatement (Second) of Judgments* §88.7 (Tentative Draft No. 3, 1976).

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[6] The State of Florida, as an *amicus* in this case, is not a party for purposes of res judicata or collateral estoppel. *See Auto Workers* v. *Scofield,* 382 U.S. 205 (1965); *Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105 (1917). The appellant was not a party to the *Fain* case. The appellees Paul M. Marko, III and Leroy H. Moe were not named as parties in the state court proceedings in this case.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed or the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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